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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-147

BOB BULLOCK, ET AL

Appellants

V.

DIANA REGESTER, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

Come now Diana Regester, et al, the original Plaintiffs below in Regester v. Bullock, together with Joe J. Bernal, et al, the Mexican-American Intervenors; Elbert Turner, et al, the Texas AFL-CIO Intervenors and Dick Reed, et al, Intervenors, and move to dismiss the State's appeal for lack of jurisdiction or, in the alternative, that the decision below be affirmed.

STATEMENT

These four civil actions were consolidated and tried before a three-judge court in Austin, Texas. Each of the actions, in varying manner challenged the apportionment of the Texas Legislature. After a trial on the merits, [1] the district court upheld the apportionment of the Texas Senate and declared unconstitutional the apportionment of the lower House. Injunctive relief was granted as to only two Texas counties, Dallas and Bexar, in which the court implemented a single-member district plan of representation. The balance of the State was left intact to afford the Legislature an opportunity to correct the existing constitutional deficiencies.

In voiding the apportionment of the Texas House, the court found that the "total deviation is not the result of a good faith attempt to achieve population equality as nearly as practicable" (App. 13, n. 5),[2] and that the "State of Texas simply

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[1] The district court heard live testimony for three and one half days and had before it over 2,000 pages of deposition testimony. Graves v. Barnes _____ U.S. _____, 92 S. Ct. 752 (1972).

[2] "App." refers to the Appendix to the Jurisdictional Statement.

had no rational State policy in the apportionment plan that resulted in the population deviation... and in the disparate treatment of metropolitan areas." (App. 19).[3] The court found no "rational justification for the haphazard combination of single and multi-member districts" (App. 22). It concluded that the State's "unexplained abandoment

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[3]The figure of 9.9 percent was the deviation as computed by the State. The Plaintiff claimed that this method tended to distort the actual percentage deviation which they asserted to be 29.3 percent.

The State had handled the large multi-member districts of Dallas (1,327,321) and Bexar County (828,413) by spreading the actual deviation of 16,289 and 7,318 respectively among the number of legislative positions which the populations had merited. Plaintiffs took the position that since Dallas and Bexar were each one district, the population excess or deficiency should be treated like the population excess or deficiency in any other district. This is probably best explained as follows: Dallas County was alloted 18 representatives for its population of 1,327,321 which was 16,289 persons short of 18 ideal districts (74,645 x 18 = 1,343,610). The State method spreads the deviation among the 18 districts for a 1.2 deviation. The Plaintiffs method treated the actual deviation of 16,289 against one ideal district for a deviation of 21.67 percent. A like method of handling Bexar County resulted in a deviation according to Plaintiffs method of 7.7 percent. (App. 13, n. 5).

of an existing State policy belies the presence of any rational State policy " (App. 21). [4]

The court found no "rational" (App. 35) justification for carving Harris County into twenty-three individual representative districts but having Dallas County elect eighteen representatives at-large. It found that the "vast inequalities of expense" (App. 33) of running for office resulted in a "substantive inequality on the basis of wealth in the protection afforded by the State's electoral laws to the rights of political association and voting" (App. 30).

It also found as to Dallas County "that [the] Black community has been effectively excluded from participation in the Democratic Primary election process" (App. 40); "recurring poor performance on the part of the Dallas County delegation concerning representation of Black interests" and that "hostility toward the Black community is still an integral part of Dallas County politics." (App. 41). Based on these findings of fact, the court concluded "that a multi-member district in

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[4] In Kilgarlin v. Martin (S. D. Tex., 1964) 252 F. Supp. 404, 444, the State of Texas explained to the court that in the future any county that attained one million population would be subdivided into less than countywide districts. Yet in 1971 when Dallas County had achieved a population of 1,300,000 it was left that large without explanation.

Dallas County tends to dilute or cancel out the vote of Dallas County's Negro minority" (App.42).

Finally, the court found "the existence [in Texas] of a recognizable Mexican-American minority..." (App. 43) which "because of long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices... had historically suffered from and continues to suffer from, the results of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others" (App. 45). In Bexar County (San Antonio) the court found that the Mexican-American population is concentrated in twenty-eight contiguous census tracts in which "the average resident lives in the most seriously straitened and deprived circumstances." [5]

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[5]This area which is 78.54 percent Mexican-American comprises almost 24 percent of the population of Bexar County but includes over 47 percent of the Bexar County housing units valued at less than $5,000, less than 1 percent of the housing units valued at over $50,000.00, over 65 percent of the Bexar County population which had never attended school, only 5 percent of the Bexar County college graduates, over 73 percent of the Bexar County families with incomes of less than $5,000, only 2 percent of Bexar County families with incomes over $25,000 and represents over 46 percent of Bexar County unemployment. (App. 48).

These "appalling conditions of poverty and its concomitants [result in] an often insurmountable cultural disorientation. . . " (App. 49) which together with the language barrier tends to isolate the Mexican-American from almost all aspects of the main stream of American life including politics. The court then found that "the cultural and language impediment, conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political process in Texas even longer than the Blacks were formally denied access by the white primary" (App. 51). The court's conclusion is best stated in its summary of the evidence as to the Bexar County Mexican-American:

> All these factors confirm the fact that race is still an important issue in Bexar County and because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities. (App. 53).

Thus, the court found that even though the Mexican-Americans in Bexar County represent

a substantial minority,[6] they nevertheless have been invidiously disadvantaged by a "concomitance of poverty, past and continuing discrimination, a restrictive electoral system and a peculiar districting scheme..." (App. 53).

Having found the apportionment of the Texas House to be unconstitutional, the court concluded to stay its hand until July, 1973 to allow the Texas Legislature adequate time to correct the deficiencies (App. 61), except with respect to Dallas and Bexar Counties where the court found the use of multi-member districts to be "egregiously out of line with constitutional requirements" (Ibid). As to these two counties, the court implemented a single-member district representation plan, and, as earlier noted, implementation of the plan did not disturb the apportionment of the State's other two hundred and fifty-two counties.

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[6] According to the 1960 census figures Bexar County had a total population of 687,151 of which 257,090 (37.41 percent) were Mexican-American, 45,314 (6.59 percent) were Black and 382,666 (55.69 percent) were Anglo-American.

According to the 1970 census figures Bexar County had a total population of 830,460 of which 376,027 (45.28 percent) were Mexican-American, 56,394 (6.78 percent) were Black and 398,039 (47.93 percent) were Anglo-American.

ARGUMENT

THIS COURT LACKS JURISDICTION UNDER 28 U.S.C., SECTION 1253

The injunctive relief is narrow. It affects only two of the State's two hundred and fifty-four counties. Although the trial court's judgment invalidates the entire State's apportionment plan, no injunctive relief was ordered affecting the statewide plan. The grant of declaratory relief alone would not confer jurisdiction upon this Court under 28 U.S.C., Section 1253, Mitchell v. Donovan, 398 U.S. 427 (1970); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Nor could the State appeal from the denial of broader injunctive relief because, of course, it suffers no injury thereby, Gunn v. University Committee to End the War, 399 U.S. 383, 390 (1970). See also Whitcomb v. Chavis, 403 U.S. 124, (1971) where the district court also found that the evidence indicated that the entire state required reapportionment but withheld action allowing the State (Indiana) a specified time to remedy the improper districting and malapportionment. From this action of the district court, reported in 305 F. Supp. 1364 (1969), the State appealed. The appeal was dismissed by this Court, citing Gunn, supra, for want of jurisdiction because no final judgment had been entered and no injunction granted.

Injunctive relief as to only Dallas and Bexar Counties is not sufficient to confer jurisdiction under Section 1253 on this Court. "The reconciling principle" of the cases under Section 2281 is a

"procedural protection against an improvident statewide doom by a federal court of a state's legislative policy." Phillips v. United States, 312 U.S. 246, 251 (1941). It has been consistently the view that "congressional enactments providing for the convening of three-judge courts must be strictly construed" Allen v. State Board of Elections, 393 U.S. 544, 561 (1969). This Court has been uniformly of the view that:

> " 'Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving a statute of general application' and not one affecting a 'particular municipality or district' can invoke [Section 2281]" Rorick v. Board of Commissioners, 307 U.S. 208, 212 (1939); Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 228 (1964); Moody v. Flowers, 387 U.S. 97, 101 (1967).

Board of Regents of the University of Texas v. New Left Education Project, _____ U.S. _____, 92 S. Ct. 652 (1972) forcefully reconfirmed that a three-judge court only "is required where the challenged statute or regulation, albeit created or authorized by a state legislature, has statewide application or effectuates a statewide policy." The injunctive relief granted below is clearly not of

statewide application as it affects only two of the State's 254 counties. Nor is there any suggestion that apportionment of Dallas and Bexar Counties was pursuant to any "general state policy," (id. 655, n. 2).

Indeed the apportionment of Dallas and Bexar Counties constitutes the very antithesis of general state policy, for according to some members of the Redistricting Board who authored the plan, Dallas County was "kept at large to conform to popular sentiment" in the County (App. 24). In fact, the members of the Redistricting Board in their testimony disclaimed reliance upon any state policy in fashioning the apportionment of Dallas and Bexar Counties. The order under attack by this appeal, i. e. apportionment of Dallas and Bexar Counties, represents no general state policy nor statutory command, and inasmuch as it affects only a fraction of the State of Texas, there is no jurisdiction basis.

THE QUESTIONS ARE NOT SUBSTANTIAL

The State's jurisdictional statement has little, if any, connection with the record or the opinion of the district court. It totally ignores the painstaking application of the standards set out by this Court. Moreover, the repeated assertion that the "conclusions of the lower court are based on no facts" (Jurisdictional Statement p. 20; cf. p. 9-18) does nothing to lend substantiality to the question.

The Three-Judge District Court found the entire plan infirm on the basis of population deviation. Whether one uses the questionable method employed by the State and arrives at a 9.9 percent deviation or whether he makes use of the Appellants' method of demonstrating a deviation of 29.3 percent, the fact of the matter is, however the deviation is computed, it always represents in excess of 21,500 people (App. 13, n. 5). It was this actual deviation that bothered the district court. This Court should not be misled by the shorthand figures in the form of percentages which the State claims adequately express their plan. Legislators represent people not percentages of people. To be swept into this shorthand trap would be ignoring what this Court held in Reynolds v. Sims, 377 U.S. 533 (1964) when it said that legislators represent people and not trees or cows.

To accept the position of the State that they need only strive for "low levels of population variance" (Jurisdictional Statement p. 13) would be a substantial retreat from Kirkpatrick v. Preisler, 394 U.S. 526 (1969) where this Court said, at page 531, that:

> to consider a certain range of variances de minimis would encourage legislators to strive for that range rather than for equality as nearly as practicable.

Appellees do not argue that absolute mathematical precision is a requirement of a constitutional apportionment plan but this Court has consistently held the law to require:

> the State to make a good faith effort to achieve precise mathematical equality. Unless population variances among districts are shown to have resulted despite such effort, the State must justify each variance no matter how small. Reynolds v. Sims, 377 U.S. 533, 577 (1964).

At the trial level, the State took the position that it was not required to justify the deviation in its plan. Now on appeal it is saying that the decisions on reapportionment are made on the basis of politics (Jurisdictional Statement p. 21-22). While the State is quite right that politics plays an important role in the interaction of legislators, this cannot be used as an excuse to disenfranchise by creating excessive population deviation among districts. This Court held ten years ago in Baker v. Carr, 369 U. S. 186 (1962), that "political question" was not a defense to reapportionment suits.

Indeed by its own conduct, Texas is precluded from claiming that its reapportionment plan is the product of a good faith effort. The plan was created by three members of a five member Redistricting Board. The three Board members who approved the plan were Attorney General Crawford Martin,

Lieutenant Governor Ben Barnes, and Comptroller Robert Calvert. These same three State officials were defendants in Kilgarlin v. Martin, 252 F. Supp. 404 (S. D. Tex. 1964). During the course of that trial, the defendants there assured the federal courts that the State's policy "limits the size of any multi-member district to fifteen representatives..." and that any county that attained a million or more residents in the future would be subdivided for purposes of representative districts, Kilgarlin v. Martin, 252 F. Supp. at 444. The court, in Kilgarlin, approved the disparate treatment between Dallas and Harris Counties in the 1965 Texas apportionment relying in part on the State's representation that different treatment would be accorded a county once it attained one million population.[7] This "policy" was called to the attention of the Redistricting Board during its public hearings on the apportionment plan for the Texas House. Nevertheless the three member majority of the Board abandoned this policy without explanation, and as the court found below, this "unexplained abandonment of an existing State policy belies the presence of any rational State policy" (App. 21).

Finally the court found that the utterly haphazard combination of multi-member and single-member districts created substantial denials of

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[7] Dallas County, with a population of one million three hundred thousand now has more population than Harris County had in 1965.

equal protection, both on the grounds of wealth and race, a holding which is completely consistent with the precedents of this Court. Cf. Taylor v. McKeithen, 407 U. S. 191 (1972).

If there ever was a minority which has been suppressed by the use of a multi-member district, it is the Mexican-American in Bexar County. The Court found that while Mexican-Americans are a large part of the county's population, nevertheless they have been limited in their impact and participation in the election of Representatives to the Texas State House. [8]

The court further concluded that this was due to a concomitance of poverty, discrimination and a peculiar electoral scheme which effectively removed the Mexican-American from this Bexar County political process (App. 55). This scheme, described as the multi-member place system, when conjoined with the absence of any formalized process of slating candidates for the Democratic primary [9]

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[8]Since 1880 a total of only five Mexican-Americans have served in the Texas State House as representatives of Bexar County (App. 52).

[9]The court found that in Bexar County, Texas the Democratic nomination for the Texas House of Representatives has been tantamount to election since no Republican has been elected since 1880 (App. 51).

literally destroyed any potential for coalition. As found by the court, Mexican-American votes were simply overwhelmed (App. 51).

The effect of this lack of impact on the elections was made clear in testimony of an Anglo member of the Bexar County delegation to the Texas State House of Representatives who was called by the State to extoll the voters of the multi-member district. He was unable to identify as much as one piece of legislation sponsored by a member of the Bexar County delegation at the most recent session of the Texas State House which might act to relieve or remedy the adverse conditions found to be extant in the barrio (App. 52). [10]

The 230,000 Black citizens of Dallas constitute 18 percent of the County population and 25 percent of the City population. They live in clearly defined sections of Dallas in virtually all Black neighborhoods. They are the product of a society that was rigidly segregated by state and local laws and customs.

From 1900 until 1966, no Black was elected to any public office in Texas nor, in fact, was any Black citizen even the nominee for public office of either the Democratic or Republican Parties. Since 1966,

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[10] See footnote 5 on page 5.

there has been one Black legislator among the 15 representing Dallas County in the Texas House of Representatives.

Evidence establishes, and the Court found, that in Dallas nomination as a candidate of the Democratic Party was tantamount to election to the Texas House of Representatives, and that nomination for these offices was controlled by a white political group known as the D.C.R.G.

The Court found that:

> "The Dallas plaintiffs have shown not only that the number of Black community residents who have been legislators is not in proporation to ghetto residents, but also that the Black community has been effectively excluded from participation in the Democratic Primary selection process." (App. 40).

The Court found further that the D.C.R.G., in the formulation of its slate of legislative candidates, "never" took into consideration the "interests of the Black ghetto" (App. 41). The antipathy of the D.C.R.G. toward the interests of the Black ghetto was forcefully demonstrated in the Democratic Primary run-off of 1970 when D.C.R.G candidates relied upon racist appeals to defeat two legislative candidates who were the overwhelming favorites of the Black ghetto (App. 42). The Court, quite properly, concluded that candidates elected on the basis of such appeals could not adequately represent the in-

terests of the Black citizens of Dallas County, and that individual districts would help insure fair representation of minority interests.

This Court told us in Whitcomb (supra) that the mere fact that ghetto residents were proportionally under-represented was not sufficient to prove invidious discrimination. Rather, we had to present "evidence and findings that ghetto residents had less opportunity" than others "to participate in the political process and to elect legislators of their choice." To say that the Blacks are represented by the D.C.R.G.'s Negro in Dallas or the Mexican-Americans by the admittedly unconcerned Anglo legislators in Bexar County is to evidence social blindness. To say that the Blacks in Dallas County or the Mexican-American in Bexar County have an equal opportunity to participate in the political process is nothing short of an absolute farce. The district court had no alternative than to find as it did.

Apart from the assertion by the State that Mexican-Americans do not deserve the protection of the Constitution because they are not a numerical minority, the State offers little else in the form of argument that substantial questions are presented. That multi-member districts have historical precedent is irrelevant to the question of discriminatory effect. Some of the most effective methods of discrimination have had extensive historical precedents. The district court evaluated thousands of pages of evidence and made fact findings as to the discriminatory effect of multi-member districts in

Dallas and Bexar Counties. Hence, the bald assertion by the State that there was no finding of fact concerning Bexar County is just wrong (Jurisdictional Statement 18).

The district court in its opinion refers to an abundance of evidence on dilution, including the effects of the majority place system (App. 38), the absence of the residency requirement (App. 38), the State's colorful history of racial and ethnic segregation (App. 38), the few minority members who are elected under the system (App. 40, App. 52), the apparent unconcern for minorities on the part of the representatives elected under the system (App. 41, App. 52), the submergence of minority votes (App. 38) and the like. This hardly concurs with the State's claim that there exists no dilution or cancellation.

The last argument made by the State is that the record establishes that Negroes in Dallas County are politically active and politically effective. It deserves little comment (Jurisdictional Statement 21). If the tokenism of the D.C.R.G. is what the State believes to be effective Black political activity then appellees submit that we might as well return to the situation extant prior to Nixon v. Herndon, 273 U.S. 536 (1924) and Smith v. Allwright, 321 U.S. 649 (1944).

The basic conclusion of the district court was that the Texas election structure isolates Mexican-Americans and Blacks in a manner not present in

the Indiana system considered by this Court in Whitcomb (supra). The Texas scheme of primary elections combines the majority requirement (and runoff) with the numbered place system. These mechanisms encourage the isolation of any minority by insuring that even if the majority is divided it can regroup in the runoff election to defeat the minority candidate.

No majority requirement was involved in Whitcomb as recognized by this Court at 403 U.S. 160. In fact, majority requirements are most uncommon outside the South and their discriminatory potential is well known Evers v. State Board of Election Commissioners, 327 F. Supp. 640 (S.D. Miss. 1971); Boineau v. Thornton, 235 F. Supp. 175 (D.S.C. 1964).

CONCLUSION

We respectfully submit this appeal should be dismissed for lack of jurisdiction, or in the alternative, that the judgment below should be affirmed.

Respectfully submitted,

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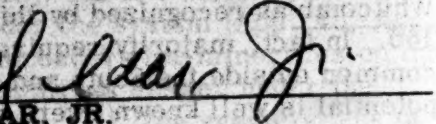
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Motion to Dismiss or Affirm have been served upon each adverse party and each other party separately represented in this proceeding by United States air mail, postage prepaid, this 11th day of September, 1972, addressed to counsel for said parties at their respective post office addresses.



ED IDAR, JR.